CITATION: J.O. v. D.O., 2021 ONSC 8061
COURT FILE NO.: FS-21-21468
DATE: 20211208

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: J.O., Applicant

AND:

D.O., Respondent

BEFORE: Papageorgiou J.

COUNSEL: *Kimberley Wilton*, for the Plaintiff

Harold Niman, *Karen Law* and *David Rappaport* for the Respondent

HEARD: November 2, 2021

ENDORSEMENT

Nature of the Motion

[1] The Applicant, J.O. (the "Mother") and the Respondent D.O. (the "Father") brought cross motions for an interim parenting schedule for the remainder of the school year for the child J.O. born XX, XX, 2008 (the "Child") and ancillary relief. The Child is currently 13 years old and will be 14 in several months.

[2] The Mother seeks an interim equal shared parenting schedule while the Father seeks something more piecemeal. As will be seen, his current proposal (which he subsequently argued was in the alternative to a parenting coordinator) would result in the Mother having approximately 35 % of the remaining parenting days during the school year.

[3] In the broader proceeding, the Mother ultimately seeks primary residence of the Child as well as primary decision-making over health and education.

Decision

[4] For reasons that follow I have determined that there has been a material change in circumstances since Justice Wilson's January 9, 2021 Order and the best interests of the Child require that the parents share week-about parenting on an interim basis.

[5] **I have set out at the end of these reasons the manner in which the Child should be told the decision and the parties are to have strict adherence to this**.

[6] I have reviewed the entire record of the proceedings to date in arriving at this decision, as will further be discussed.

[7] The Father argues that the Mother is requesting a significant change which should not be made on the basis of affidavits not tested by cross-examination. However, I have not relied upon facts in dispute. I have relied primarily upon corroborated and/or uncontradicted facts and contemporaneous documents. I have placed significant reliance on the Father's own evidence, read in context, much of which supports the Mother's position as to the Child's views and preferences as well as other matters. I have indicated where there is some evidence in support of a proposition which has not been proven to the requisite standard and when I am only quoting a party's position.

[8] As well, I note that the Father has not sought to conduct any questioning even though this is now the third proceeding in this Application where the parties are relying upon multiple affidavits which essentially elaborate on the same events.

[9] As directed by prior courts, I have considered and balanced all the relevant evidence and factors on the record before me. My sole focus has been whether there has been a material change in circumstances and what is in the Child's best interests right now.

Background

[10] This is the second court proceeding relating to this Child between the Mother and Father. The parties had a contentious high conflict marriage, followed by a prior court application, mediation, arbitration and the involvement of a parenting coordinator. None of this has worked to solve the conflict.

[11] In May 2011 the parties executed a separation agreement that provided they have joint custody (and share decision making) with an equal-time-shared residential schedule. In 2012 the joint custody arrangement was not working. The parties retained social worker, Linda Popielarcyzk to conduct a parenting assessment. She recommended joint decision making and an equal parenting schedule in March 2013. However, they continued to experience regular conflict.

[12] In or around 2013 or 2014 the Mother moved to Rhode Island with her new spouse. As will be seen, the parties entered into a parenting plan that allowed her to maintain a strong relationship with the Child.

[13] Although the Father's narrative suggests that the Mother abandoned the Child when she moved to Rhode Island, the uncontradicted evidence is that the parties had a prior contested custody battle, they tried coparenting, and could not get along or agree. The Mother says she was faced with the choice of engaging in prolonged battle with the Father over sole custody of the Child or conceding custody.

[14] While it is early days to draw firm conclusions about the Mother's motivations in 2013, the Mother's evidence that she left because of the conflict is supported somewhat by the Father's October 18, 2021 affidavit, where he says that the Mother moved "after years of intense conflict."

The 2014 Parenting Plan

[15] The 2014 parenting plan was not filed with the court and was not a court order. This court has never considered the best interests of this Child.

[16] Pursuant to the 2014 parenting plan the Child's "primary residence" would be with the Father and his "second residence" would be with the Mother. The parenting plan did not define what that meant. It was agreed that the Mother would have parenting a minimum of one weekend per month, which included a Friday or a Monday as well as sharing of March break, summer vacation and winter break holiday equally. The parenting plan did not define what 'minimum' meant or how the Mother's additional time would be determined; although it specified a parenting coordinator who would assist for the first two years.

[17] The 2014 parenting plan provided that if the parenting coordinator's term was not extended or new arrangements put in place, any dispute about the parenting plan may be brought before the Superior Court of Justice.

[18] I emphasize that the parenting plan spoke in terms of minimum parenting time for the Mother. It did not fix parenting time but left it open to negotiation; it is uncontradicted that it fluctuated although there is disagreement as to how much.

[19] From 2016 onwards, the Mother would spend her parenting time with the Child in a condominium she continuously leased in Toronto, in Rhode Island, or at her family farm in Nova Scotia.

[20] The Mother says she noticed the Child's behavior began to change significantly in the weeks leading up to Mother's Day 2020, which was on May 10. The Mother reports that he was upset, crying every day and told her he was crying himself to sleep at night. He would ask her to stay with him for hours on social media to keep him company. He was experiencing significant stress at his new school and difficulties adjusting. She says he threatened to run away and begged her to come and see him. She immediately left Rhode Island and drove to Ontario to see him.

[21] The Mother's evidence that the Child began experiencing distress in May 2020 is supported by the Father, who similarly reported that the Child's behavior changed around May 2020. He confirms that the Mother returned on May 10, 2020.

[22] Therefore, I accept that beginning in or around May 2020, the Child began experiencing significant stress. I note that the pandemic and online learning had begun around that time.

[23] From May 2020 until January 2021, the parties did not follow an agreed upon parenting time schedule but negotiated visits piecemeal which resulted in significant conflict. I find this as a fact based upon on all the communications before me between the Mother and Father's counsel and the prior proceedings herein.

[24] On February 8, 2021, on the eve of a court motion regarding the Mother's parenting time, the Child ran away from the Father's home and went to the Mother's residence at 11:45 pm. The

Mother advised the Father by our Family Wizard that he was at her home. The message dated February 8, 2021 at 11:47 pm stated "[The Child] ran away from your house tonight and has come to mine at 11:45 pm tonight. I could not make him go back to you. I am exhausted, and I will have to sort things out in the morning. I will also phone my counsel in the morning, as this is unchartered territory, and I have no idea how to proceed." The Father complains she should have phoned instead of using Our Family Wizard, although he also says he did not notice the Child was missing until the morning. He also argues without any evidence that the Mother convinced the Child to run away.

[25] On February 9, 2021, Justice Wilson made a parenting order to June 2021, which would occur in Toronto until it was safe and acceptable to travel to the USA without quarantine restrictions. It is uncontradicted that the parties had equal parenting time during the summer of 2021 (as they always have). Justice Wilson's Order significantly increased the Mother's parenting time from previous years.

[26] The parties also agreed to a temporary without-prejudice parenting schedule at the September 7, 2021 case conference which provided the Mother with parenting time from September 16-23, October 7-14 and October 28 to November 1, 2021.

The Materials Before Me

[27] The parties had each filed affidavits on this motion: Mother: October 8 and 24, 2021, and the Father: October 18 and 28, 2021. This is a high conflict situation and there have already been 2 prior proceedings within this action. The Father made specific references to his two prior affidavits dated November 23, 2020 and February 5, 2021 in his October affidavits. The Mother also made references to her previous materials although none of these prior affidavits were mentioned in the parties' confirmations. The Mother's previous affidavit was dated January 31, 2021 and was specifically referred to in one of the Father's October affidavits.

[28] I determined that I required a more fulsome understanding of the evidence and proceedings filed in the record to date, in particular because of the psychoeducational assessment referenced in the Father's October 18, 2021 affidavit which documented the Child's considerable emotional suffering.

[29] I wrote to the parties regarding the Court's review and use of prior affidavits. The Father's counsel indicated they had indeed referred to prior affidavits in case I required a more fulsome understanding. I said I did. The Mother's counsel initially objected, but then argued that if I would be looking at the Father's prior materials then I should look at hers as well. Counsel for the Father advised that she had no objection to this, although later asked for a case conference.

[30] I held a case conference on November 15, 2021, which was recorded for transparency. I released an endorsement dated November 17, 2021 summarizing what took place at the case conference and advising the parties that they could make further submissions, which I received in full by December 1, 2021.

[31] I note that there was important evidence contained in the prior affidavits and proceedings which I have taken into account. Counsel advised that they had limited the materials before me because of the Practice Direction with respect to page limits for short motions.

Does the Mother Need to Demonstrate a Change in Circumstances?

[32] The Father asserts that the Mother must demonstrate a material change in circumstances in reliance on various cases which reference the test when there is a court ordered parenting plan.

[33] In *Gordon v. Goertz*, [1996] 2 SCR 27, at para.13, the Court set out the test for variation of a final custody order:

> 13 It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

[34] Pursuant to *Gordon v. Goertz* once the court is satisfied that a material change has occurred, the court then considers the matter afresh without defaulting to the existing arrangement: *Gordon*, at para. 17. The material change in circumstances required is not overly onerous: *see e.g. Moar v. McLaughlin*, 2021 ONCA 264, at para. 7.

[35] The Mother asserts that she need not demonstrate a material change in circumstances because the 2014 parenting plan was not a court order which is presumed to be correct, but a private agreement. She references section 56(1) of the *Family Law Act*, R.S.O. 1990, c. F.3, which provides that when determining decision-making responsibility or parenting time of a child, "the court may disregard any provision of a domestic contract pertaining to the matter where, in the opinion of the court, to do so is in the best interests of the child."

[36] The Mother also references paragraph 70 of the 2014 Parenting Plan which contemplates this proceeding and a change in the Child's residential schedule if it is in his best interests:

> 70. In the event either [the Father] or [the Mother] feel it is in [the Child's] best interest that there be a significant change to the residential schedule, he or she shall raise his or her proposal, and the reasons for it, with the other parent…Failing agreement or other process, either party is at liberty to apply to the Superior Court of Justice to have the issue determined."

[37] The Father argues that *Gordon* applies even if there is no court order, but only a private agreement. He relies upon *Woodhouse v. Woodhouse* (1990), 29 O.R. (3d) 417 (C.A.), which in turn relies upon *Carter v. Brooks* (1990), 2 O.R. (3d) 321 (C.A.), for the proposition that it is reasonable to think that at the time of a separation agreement, it reflected their view of the best interests of the child. The court's comments in *Woodhouse* in context are as follows:

> Separation agreements are not binding on the court because it is the interests of the children rather than those of the parents which are at issue…Nevertheless, it is reasonable to think that at the time the separation agreement was made it reflected the parties' view of the best interests of the children…The trial judge should consider the prior agreement as well as the evidence of proposed or changed circumstances. Even though the parties are, strictly speaking, governed by the provisions of the Children's Law Reform Act, R.S.O. 1990, c. C.12, both it and the Divorce Act state that the governing test is the best interests of the child….Specifically, while the maximum contact principle contained in ss. 16(10) and 17(9) of the Divorce Act is not articulated in the Children's Law Reform Act, the parties agree that this principle is nevertheless applicable when considering whether the provisions of a separation agreement relating to custody and access should be varied. The legal status of the relationship between the child and the parent is not in itself determinative of the best interests of the child. In this regard it is the actual involvement of the parent not the label attached to custody which is important. Whether there is a court order or a separation agreement, the court will be engaged in determining what is in the best interests of the child in all the circumstances, old as well as new.

[38] He also relies upon *Papp v. Papp* [1970] 1 O.R. 331 for the proposition that a child's status quo parenting arrangements ought not to be disturbed in the absence of cogent evidence that the best interests of the child dictate otherwise. The Court stated:

> It may be taken as a working rule that evidence to warrant an order for interim custody must more cogently support disturbance of the de facto situation than evidence to support an order for custody after trial on the merits. But, as in custody after trial so in respect of interim custody, the welfare of the children is the paramount consideration; and any difference in the required weight of evidence is a matter of degree and not of kind.

[39] It should be noted, however, that the Court of Appeal in *Papp* concluded that "[t]he *Divorce Act*…. reposes a discretion in the Court in speaking of the making of interim orders 'as it thinks fit and just' in respect of maintenance and custody of children."

[40] The Father also relies upon *Ivens v. Ivens*, 2020 ONSC 2194, 40 R.F.L.(8th) 135, at paras. 75-76, where the Court indicated that the test to vary a final custody order at an interim motion required a strong prima facie case, clear hardship, and urgency.

[41] *Ivens* was an urgent motion by teleconference where the mother sought to suspend a final court order granting shared parenting and replacing it with a temporary order that the children would remain in her exclusive care indefinitely; thereby eliminating the father's in-person parenting time.

[42] In the *Ivens* case, the trial judge who had made the final order specifically found that the mother had been undermining the father's relationship with the children, contrary to clear terms of a court order. She had withheld the children from the father for over three months contrary to a court order. She had been found in contempt. Therefore, at the urgent motion, the motions judge had good reason to accept that the children's expressed preference for residing with the mother had been influenced by her. These are not the facts before me, and this case is distinguishable.

[43] The Father also relies upon *K. (F.) v. K. (A.).* 2020 ONSC 3726, 43 R.F.L. (8th) 411, where the court directed that varying a final parenting Order on an interim basis should be done cautiously. The court must start with the two-part test in *Gordon* and that the court must also assess whether the changed circumstances have created a situation of actual or potential harm, danger or prejudice for the child of such a nature or magnitude that immediate rectification or correction is required to safeguard the child's best interests. The court held that the moving party must establish that in the current circumstances the existing order results in an untenable or intolerable situation; jeopardizing the child's physical and/or emotional well-being; and that delay in addressing the problem is likely to continue or exacerbate actual or potential physical and/or emotional harm for the child. The court must be satisfied that the child's best interests "require" an immediate change. The court must be satisfied on a balance of probabilities that there is a clear and compelling need to make an immediate change. See also *S.H. v. D.K.*, 2021 ONSC 4413, which involved a motion to vary a final consent order and followed *K. (F.) v. K. (A.).* The court set out the test as follows, in *S.H. v. D.K.*, at para. 28:

> a. There must be a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet those needs.
>
> b. The change must materially affect the child.
>
> c. It must be a change which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order. The change must be substantial, continuing and if known at the time, would likely have resulted in a different order. [citation omitted]

[44] I need not resolve the contested legal issues as in my view, the record before me satisfies the highest test which the Father has put before me.

[45] There is cogent evidence before me which demonstrates a prima facie case of the following material/substantial changes: 1) In a report dated March 2021, the Child was diagnosed with ADHD, anxiety and somatization. On the record before me, these diagnoses did not exist at the time of the 2014 parenting plan and therefore could not have been taken into account by the parties when they negotiated their parenting arrangement; and 2) at the time of the 2014 parenting plan the Mother had relocated to Rhode Island where she has a new spouse and step-child. Because of the Child's significant distress, and his wish to spend more time with her, although her primary residence is still in Rhode Island, the Mother has returned to Canada and is prepared to have equal

shared parenting time with the Child during the school-year in Toronto for as long as the Child needs. She has been primarily in Toronto for the last year and a half, and has remained here. See *Gordon*, at para. 14 and *Dunn v. Shaw*, 2014 ONSC 1953, at para. 44 where courts have found that a parent's move is a material change in circumstances which justified ordering equal parenting time. See also *Moar*, at para. 7.

[46] There is no evidence before me that these changed circumstances could have been reasonably foreseen at the time of the 2014 parenting plan; the absence of such evidence is cogent as I have now reviewed four of the Father's affidavits and he has not provided any evidence of reasonable foreseeability of these changes at the time of the agreement.

[47] Finally, for all the reasons set out below there is also cogent evidence that: a) continuing with periodic negotiations about the Mother's parenting time in accordance with the 2014 parenting plan -- without a fixed and predictable schedule -- results in significant conflict and creates a situation of potential harm to the Child; b) this matter is urgent; and c) the Child's best interests require an immediate change to week-about parenting. I find that there is a clear and compelling reason to make a change.

[48] As set out in *Pereira v. Ramos*, 2021 ONSC 1737, at para 58: "[t]he court has a duty to intervene and change the parenting schedule if it is not satisfied that the current arrangements meet the children's best interests."

Best Interests of the Child

[49] Both parties have referred to *Children's Law Reform Act*, R.S.O. 1990, c. C.12 ("CLRA"), in their submissions. However, these parties were married, and the *Divorce Act* definition of spouse includes "former spouse." Therefore, it is the *Divorce Act*, R.S.C., 1985, c. 3, which is applicable. Although the provisions with respect to the best interests of the Child are the same, the right act should be referenced.

[50] The best interests of the child are paramount. Section 16(1) of the *Divorce Act* makes explicit that any parenting order or contact order must be determined based only on an analysis of the child's best interests.

[51] The *Divorce Act* also states that in allocating parenting time, the court shall give effect to the principle that a child should have as much time with each parent as is consistent with the interests of the child: s. 16(6). It is in the best interests of a child to have a meaningful relationship with both parents and not to be exposed to conflict: *Pereira*, at para. 26.

[52] Above all else, the primary consideration that the court must consider is a child's "physical, emotional, and psychological safety, security and well-being": *Pereira*, at para. 13; *CLRA*, s. 24(2); see also *Divorce Act*, ss. 16, 7.1, and 22.1.

[53] Other relevant considerations are also contained in section 16 of the *Divorce Act* as follows:

a. the child's needs, given the child's age and stage of development, such as the child's need for stability;

b. the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;

c. each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;

d. the history of care of the child;

e. the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;

f. the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;

g. any plans for the child's care;

h. the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;

i. the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;

j. any family violence and its impact on, among other things,

   i. the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and

   ii. the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and

k. any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

[54] As set out in the Father's factum, the best interests analysis is holistic, taking into account a child's well-being in a broad sense, including their "basic material, physical, educational, and emotional needs, as well as needs for affection and safety," *S.S. v. R.S.*, 2021 ONSC 2137, citing the *UN Committee on the Rights of the Child*. The court is to engage in a rigorous assessment of the specific child's circumstances: *S.S. v. R.S.*, at para. 37.

The History of the Child's Care

[55] It is uncontradicted that after the Child was born in 2008, the parties co-parented unsuccessfully until 2013, when the Child was five. After 2014, the Child resided primarily with

the Father, but their parenting plan provided that the Child would have a second residence with the Mother, as noted above.

[56] Even though the Mother lived primarily in Rhode Island beginning in or around 2013, she has remained actively involved in the Child's life: She volunteered at his school, flew up to Toronto for a day sometimes, sewed costumes for his school play, tailored his uniforms, attended all parent-teacher conferences both virtually and in person, encouraged the Child's love of sports, and took him to his hockey games and cheered him on. She has taken over fifty flights per year to accommodate her parenting time in Toronto. She maintains a second residence in Toronto near the Child's school and the Father's residence. She wrote him daily handwritten letters during the pandemic when she could not see him. The Father did not contradict any of these specific contributions which the Mother says she has been making; although he has some concerns with hockey which I will discuss below—therefore, I accept these facts.

[57] The Father takes the position that he has raised the Child "almost on his own", which is simply not believable based upon the record before me, and, as will be seen, the strong bond the Mother and Child clearly share.

[58] There is a conflict in the evidence as to how many parenting days the Mother has had in the past but up until the Child was five they co-parented. After 2014, both parties agree that the Mother's parenting time fluctuated and their evidence shows that it was on a trajectory of increasing time for the Mother. This is a comparison of the Mother's parenting days alleged by both during the **academic year**. It should be noted that the Mother also had ½ of the summer so her total parenting days for the year would increase by approximately 30 days for each calendar year and I have done the calculation for the Mother's total parenting time per year:

	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020	2020-2021
Father's position	60 + 30 = 90	71 + 30 = 101	79 + 30 = 109	69 + 30 = 99	88 + 30 = 118	79 + 30 = 109	99 + 30 = 129
Mother's based on Exhibit C to Jan 31 affidavit	63 + 30 = 93	69 + 30 = 99	87 + 30 = 117	74 + 30 = 104	91 + 30 = 119	91 + 30 = 121	unclear

[59] The Father's best case position is that the Mother has had no less than approximately 25 % of the parenting days since the 2014 parenting plan and that in 2020-2021, she has had approximately 35 % of the total parenting days. As noted above, his proposal for the remainder of the academic year, would provide the Mother with approximately 35 % of the remaining days up until the end of June 2022.

[60] As will be discussed, the main problem with the Father's proposal is that it is haphazard and provides absolutely no predictability and stability for the Child apart from some theoretical concept of the Child being "primarily" with the Father. This Child has been diagnosed with ADHD and the Father's proposal is completely unworkable even in the absence of all other considerations which I will discuss.

The Child's Views and Preferences

[61] Subsection 16(3)(e) of the *Divorce Act* provides that in determining the best interest of the child, a court shall consider all of the child's needs and circumstances including "the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained."

[62] As noted by the Court in *S.S. v. R.S.*, at para. 27-28:

> 27. A human rights-based approach to the new Divorce Act calls on courts to recognize, respect and reflect each child as an individual distinct from their parents and to empower children to be actors in their own destiny."
>
> 28. In practice, it requires judges to probe into each child's lived experience, to meaningfully consider their views and preferences, and to craft an order that promotes the child's best interests and overall well-being.

[63] The 2014 Parenting Plan specifically notes the importance of seeking the Child's views:

> 22. The wishes and opinions of [the Child] shall be taken into consideration according to his age and stage of development, keeping in mind that his wishes are not always possible, reasonable or in his best interests.

[64] The Mother indicates that the Child repeatedly tells her he wishes to spend most of his time with her and that transfer times are becoming increasingly difficult, as the Child does not want to return to the Father's home. She reports that the Child even becomes physically unwell due to stress and anxiety on transition days. As will be seen below, his problem with somatization, when he is stressed, is corroborated by the independent psychoeducational assessment.

[65] The Father's affidavits support that the Child wishes to spend more time with the Mother. In his previous affidavit (November 23, 2020) he has described instances where the Child requested permission to spend more time with the Mother. The Father stated "I know that [the Child] enjoys spending time with his mother and I accommodate that as much as possible". He attached communications from the Child to the Mother where the Child is literally begging to see the Mother. For instance, the Child says "I just want to see you can we just be two weeks." The Child texted the Father on one occasion when he was supposed to return to the Father's home and said: "I don't want to be dropped off, I want to stay with my mom for another two weeks because

I missed so much time with her. I will Instagram call you on your birthday." The Child ran away from the Father's to the Mother's on one occasion, as noted above. Per the Father's own evidence, the Child advised CAS that he wished to live with the Mother, and did not want to live with the Father. (I will address the admissibility of such statements below.)

[66] Nowhere in the four affidavits which the Father has filed does he deny that the Child wishes to spend more time with the Mother or that he wishes to live with her. Therefore, the Mother's evidence is uncontradicted. The Father lives with, speaks to and observes the Child. If he had made any determination that the Child did not wish to spend more time with the Mother, or did not want to live with her, I infer he would have said so, particularly in the context of this proceeding. Therefore, I accept the Mother's uncontradicted, corroborated evidence that the Child wishes to spend more time with his Mother.

[67] Indeed, in his final October 28, 2021 affidavit the Father states that the parenting plan he proposes "increases the time [the Child] spends with [the Mother] while maintaining his primary residence, **which accounts for [the Child's] wishes to spend more time with [the Mothe**r.]" [Emphasis added] This is a clear admission. I note that the Father relies upon *Ganie v. Gani*e, 2015 ONSC 6330 at para 7 regarding the weight which should be given to the custodial parent's views. Therefore, the Father's views of the Child's wishes should be given great weight.

[68] Although neither counsel objected to any evidence of what the Child has said about his preferences as hearsay during the argument of the motion, in his February 5, 2021 affidavit, the Father objected to some of the Mother's statements regarding what the Child has told her in her January 31, 2021 affidavit as hearsay. As a result, I will analyze the admissibility and weight to be given to the Child's statements that he wishes to spend more time with the Mother.

[69] First, this hearsay evidence is uncontradicted. It is reliable because it is reported by three people, the Mother, the Father and the CAS worker. I consider CAS to be an organization with skill in interviewing children. What the Child reportedly said to the Mother and to CAS is consistent with the Father's observations of the Child's behavior and text messages in the record from the Child. Although the hearsay evidence from CAS is double hearsay, it is the Father who is reporting these statements, which is against his interests. Had the Child not told this to CAS, and had the Father not heard it from CAS, I infer the Father would not have stated this in his affidavit. Therefore, I accept that the Child told CAS he wanted to live with his Mother.

[70] The Child's statements are necessary because the Child is not here and the Father has previously taken the position it would be inappropriate to do any section 30 or a Voice of the Child report, because the Child was starting therapy at the time. The Father indicated in his February 5, 2021 affidavit that it could take half a year for a section 30 report. The Mother's uncontradicted evidence is that she has provided the Father with a list of assessors (supported by the letters as early as January 2021) and there is no evidence that he has responded or that any section 30 assessment is underway. This is indeed surprising since his February 5, 2021 affidavit in support of delaying the section 30 assessment indicated that the Father had agreed to an assessment and was currently "deciding who the assessor should be." In this motion, he also opposes the

involvement of the Office of the Children's Lawyer. It appears that a section 30 assessment or even a Voice of the Child report will be a long drawn out affair.

[71] In all of the circumstances, the Child's statements regarding his preferences are admissible for the truth of their contents pursuant to the principled exception: *Perry Estate v. Cholette*, 2013 ONSC 4610, 90 E.T.R. (3d) 227, at para. 41.

[72] I note as well that pursuant to rr. 14(18) and (19) permits evidence on information and belief.

[73] In my view, while a section 30 report or Voice of the Child report will be of assistance to a Court making a final determination as to whether the Child's primary residence should change, there is enough evidence before me to take into account his views when determining an interim parenting plan.

[74] I find as a fact that the Child's views and preferences are to spend more time with the Mother. He is almost 14 years old and therefore of an age where his views and preferences should be taken into account. As I will discuss below, although the Father takes the position that the Mother has been alienating the Child from him, the record does not support this.

The Child's Needs

[75] For a variety of reasons, the Father argues that the Mother's proposal to have shared parenting is not in the Child's best interests. With the exception of some incidents which occurred more than a year ago (which I will address in full), I have found that on the record before me, the Father is generally mistaken in his extreme criticisms of the Mother, considering all of the evidence in context, together with the many uncontradicted facts and the contemporaneous documents. Indeed, I have relied almost entirely on the Father's own evidence and the contemporaneous documents to conclude that most of his criticisms, and conclusions about the Mother's conduct, are not justified.

[76] I have found nothing on the record that should disentitle the Mother from an equal shared parenting arrangement, if that is in the Child's best interests.

Stability for school

[77] The Child's interim report card in February 2021 (attached to the Father's affidavit) includes the following marks: Science: 73, Instrumental Music: 78, Religious Education: 81, Social Studies: 84, Mathematics: 52, Physical and Health Education: 93, English: 54, Computer Programming and Technology: 94, and French: 63, for an overall average of 74.

[78] These are the Child's academic marks before a psychoeducational assessment was done at the Father's request.

[79] On February 11 and 12, 2021 the Child was sent for a psychoeducational assessment for the following reasons set out in the report:

> [The Child's] father has requested a psychological assessment to better understand his cognitive, academic, learning, and attention profile to better aid his successful transition to a new school. [The Child] has had academic struggles and it is hoped that a fuller understanding of how these struggles would inform the supports necessary for his future success.

[80] This assessment, on its face, was entirely for academic purposes.

[81] The Father relies heavily on the resulting psychoeducational assessment dated March 2021. He has put this report before me and relies upon it. The Mother did not object. Even though there is no affidavit from the assessor, in the circumstances where both parties are relying upon this report, I accept it.

[82] Apart from the recent examples of the Child running away from the Father's home and calling CAS, which is discussed below, there is no evidence that the Child has any historical behavioral issues, exhibits defiance or any other concerning behaviors. Indeed, in the report his teachers describe him as "a hard working student who wants to do well, who requires academic support," and as "interacting well with his peers, wanting to please and succeed, but struggling in math and with task completion." He is captain of his hockey team, interested in baseball, skiing, sailing and playing bass guitar and trumpet. He was on the top hockey team at his former school, was involved in baseball and soccer, and makes friends easily. The Father describes him as "an easy-going kid."

[83] The assessor described him as providing well formulated responses to questions and noted that he put forth his best effort on tasks and worked hard. The assessor concluded: "Overall [the Child] was a pleasure to assess. He tried his best on all tasks presented to him."

[84] The assessment concluded that the Child has ADHD and made a number of recommendations, including: that he be placed on an Individual Education Plan, that he receive some accommodations throughout the day, that his parents read books on ADHD, that he be placed with a "**nurturin**g" teacher [Emphasis added], and that he obtain test accommodations which include additional time, the use of memory aids, and such.

[85] The report the Father relies so heavily upon is mostly about school accommodations.

[86] The Father has not explained how having the Child primarily reside with him somehow offers more structure and stability given his age, the focus of the report, and the fact that school accommodations appear to be working.

[87] I acknowledge the caselaw which the Father has put before me regarding the Court's respect of a custodial parent's views: *Ganie v. Ganie* at para 97; *Gordon v. Goertz* at para 32. However, in my view, the Father is putting forward a vague and unsupported argument that living primarily in one home (his) is the only way to ensure stability and predictability for the Child's learning.

[88] The Father has cited *Atkinson v. Atkinson*, 2020 ONSC 6054, at para. 20, and *C.C. v. S.C.*, 2021 ONSC 5414, at para. 38, in support of his argument that where a child has ADHD, stability is important. However, these cases do not stand for the proposition that all children diagnosed with ADHD must reside primarily with one parent.

[89] In *Atkinson,* the child's ADHD was one of a multitude of factors that the court took into account.

[90] In *C.C. v. S.C.* the trial judge had made a parenting order at trial which resulted in slightly less than half of a ten-year-old's time being spent with the mother. The mother was non-compliant with the parenting order. In the context of a motion brought by the father to suspend her parenting time until she complied, the court noted that a therapist had testified at trial that predictability was important for a child with ADHD and that the parenting schedule must be followed for that reason. Notably, the trial judge had already made a parenting order giving the mother slightly less than half of the parenting time at trial, even taking into account the need for predictability. The problem in the case was that the mother was not following the schedule, not that the child needed to be primarily with one parent for the sake of predictability.

[91] Here, the father fails to offer any persuasive evidence that the Mother is unable to provide an appropriate environment for learning and consistency for this thirteen-year-old Child. The Father references his belief that the Mother permits the Child to play videogames too much, but he has no independent evidence in this regard. The assessment directs the parents to resources to learn about ADHD and take steps to assist the Child; both parents have these resources and I have no reason to believe the Mother will not use them.

[92] There is no good reason in the record to conclude that this Child's need for stability is a sufficient reason to deny him his request for more parenting time with the Mother if that is in his interests.

The Child's Emotional Needs

[93] Indeed, when the assessment is reviewed in totality, it appears that one of the most significant problems which the Child has, and which is impacting on his academics, is his emotional health. I find it concerning that the Father does not reference or acknowledge these important parts of the psychoeducational assessment:

> [The Child's] father endorsed the clinical range for anxiety and the at-risk range for somatization. [The Child's] mother endorsed "at risk" levels of concern for anxiety and somatization. His math teacher reports clinical concerns with anxiety, whereas his English teacher reports concerns with somatization. Somatization is often symptomatic of anxiety.

[94] The independent testing done by the educational consultant also supported that although he is a happy, well-adjusted adolescent, the Child has been experiencing anxiety and somatization:

> "**He worries about school and wishes he didn't have to complete what he sees as an overwhelming amount of homework. He reports feeling others don't realize that he is going through a tough time**." [Emphasis added]

[95] The report concluded:

> [The Child] presented as a bright and kind adolescent whose challenges with attention are consistent with a diagnosis of Attention Deficit Hyperactivity Disorder—Combined Type. **He is also quite anxious and stressed, which can magnify weaknesses in attention and increase impulsivity. It will be important that these areas be addressed in order for [the Child] to achieve his fullest potential**. [Emphasis added]

[96] The report also recommended that the Child would benefit from psychotherapy in dealing with his anxiety, and I note that the Father did appropriately arrange this.

[97] The psychoeducational assessment supports that the Child's distress is being caused by a combination of his learning disability and academic pressure. Although admittedly the assessment is about academics, the assessors interviewed the Child and had there been anything they discovered about the impact of the Mother's conduct on the Child's academics, I infer they would have put that in the report.

[98] Justice Wilson's February 9, 2021 Order provided that the Child immediately start having therapy because of his anxiety. The Father says that since the therapy began and school accommodations were put in place, the Child's mental health has improved. This also supports the understanding that the cause of his distress was his learning disability and academic pressure, which appear to have been helped by the accommodations—not the Mother.

[99] As noted above, pursuant to Justice Wilson's February 9, 2021 Order, the Child was having parenting time with the Mother during the school week, although not on an equal basis with the Father. The Mother's parenting time pursuant to the Order was during the school week: March 31 to April 7, April 21 to April 26, May 7 to May 12, May 19 to May 24, June 4 to June 9 and June 18 to 25. The assessor, who met with the Child after Justice Wilson's Order, did not recommend any limitation on the Mother's parenting time during the school week to ensure predictability and stability.

[100] The Child did receive one mark in French at the end of the 2021 academic year which the Father was not satisfied with. In an email to the school dated July 13, 2021 the Father stated that he was "**disappointed** in" [Emphasis added] this mark and he sought more information. I am inferring that the rest of the Child's report card must have been satisfactory and the accommodations are working.

[101] The Father implies that the disappointing result in French was the Mother's fault, but there is no correlation offered between the Mother and the mark. Indeed, the Child was residing

primarily with the Father at the time, which means most of his homework and studying must have been done there.

[102] An important factor in this case is that this is not a child with significant behavioral issues. He does not object to doing schoolwork and he cares about school. He is very intelligent, tries hard, has some challenges, but has obviously accepted his diagnosis and the accommodations. This child is not in dire straits academically, unless there is some expectation that all his marks have to be in the 80's or 90's immediately. Crucially, he has been emotionally distraught.

[103] The assessment expressly indicates that the Child's ADHD cannot be dealt with without addressing his emotional needs. The Child has repeatedly expressed that he wants more time with the Mother. He has stress and anxiety and it is imperative that his wish and his need to be with his Mother is acknowledged to ensure his academic success.

[104] I will now address some of the specific concerns and criticisms the Father has raised about the Mother. In my view, on the record before me, his concerns are not supported.

Choice of School

[105] The Father complains the Mother is not supporting the Child academically because she has raised concerns about his choice of school. I am not identifying this school to protect the Child's anonymity, but it is a private school with a rigorous academic program particularly in Math where the curriculum is advanced by one year.

[106] The Father fails to acknowledge that the 2014 parenting plan specifically states that although the Father would make the final decision regarding the choice of school, it was "subject to the decision being challenged by [the Mother] on the basis that the decision is not in [the Child's] current and long-term best interests."

[107] The Mother did raise many concerns about the school not being the right school for the Child due to his being almost on academic probation during the fall of 2020, his ADHD diagnosis, and his current stress and anxiety. She feels that there is too much pressure on the Child. She has proposed a variety of alternatives which offer a more **nurturing** environment. I note that the assessment specifically recommended that the Child be placed with a "**nurturing"** teacher. There is nothing wrong with having a different viewpoint of what is right for the Child and expressing it, even if she expressed it often and even if the Father was the ultimate decision maker and disagreed.

[108] In her October 24, 2021 affidavit she confirms that "now that [the Child] is attending [the school]…[she] fully and actively support[s] him at his current school. If [the Child] thrives at the school with accommodations in place, then [she] would be happy for him to continue."

[109] The Mother is reserving her position on the appropriateness of this school pending further information on whether the accommodations in place are successful. This is a reasonable and appropriate parenting position in the circumstances.

[110] On the record, the Mother has demonstrated her commitment to supporting the Child's academic progress at the school by contacting the school to discuss the Child's education and accommodations as required, by volunteering, and by joining the PTA. These facts are supported by email communications from the Mother to the school and I accept what she says because it is corroborated by these contemporaneous documents. On the record before me, there is no believable basis to conclude that the Mother (who has travelled 50 times a year to be with the Child) would sabotage the Child's success just to change his school.

[111] On the record before me, I am not concerned about the Mother's ability to support the Child academically in a stable environment.

Willingness and Ability to Meeting the Child's Needs

[112] The Father has questioned the Mother's motives. He argues that she is placing her own needs above the Child's. In all the circumstances, this is not persuasive. Initially, she agreed to the Child's primary residence with the Father when he was six (after several years of conflict and an unsuccessful attempt at coparenting). She indicates this was because she felt that was in the Child's best interests at the time due to the ongoing conflict.

[113] She says that she only began seeking more parenting time with the Child and commenced this application because of the uncontradicted evidence that the Child has been in distress and wishes to spend more time with her. He was particularly distressed during the pandemic and on-line learning, during which time she says he telephoned her crying and begging her to come see him. It is uncontradicted that the Child was distressed in May 2020 and I have found that that he wishes to spend more time with her. Therefore, her evidence is supported and I accept it.

[114] Between May 2020 and November 2021, the uncontradicted evidence is that the Mother spent only 48 days in Rhode Island, which is 8.9 % of her time. She indicated that her husband and her are having discussions about the management of their business, which is based in Rhode Island, to accommodate her residence in Toronto. She has come to Toronto at tremendous financial and personal sacrifice. She put the Child's interest before hers when she agreed to his primary residence with the Father to end the conflict, and she has again put the Child's current needs before hers for the last year and a half while she has stayed in Toronto when he has needed her.

Prioritizing a Section 30 Report over a Psychoeducational Report

[115] The Father alleges that the Mother does not provide proper care for the Child because she was prioritizing the need for a section 30 report for the Child over the psychoeducational assessment which had been recommended by the pediatrician. The fact that she brought a motion for a section 30 assessment returnable February 9, 2021, which she subsequently agreed to withdraw until after the psychoeducational assessment, does not mean she was not providing proper care.

[116] This is a moving picture with new developments taking place with respect to the Child's welfare which these parents are adjusting to with their ongoing decisions. I note that Justice Kraft's December 2020 endorsement indicates that at that time, the Father advised that he wanted to retain

a custody and access assessor to complete a s. 30 report. Indeed, Justice Kraft ordered that within five days the Mother would be required to provide her position on whether she consents to a s. 30 custody and access assessment. The Father's February 5, 2021 affidavit contains a letter from his counsel dated January 29, 2021 where he references the physician's recommendation for a psychoeducational assessment. On the record before me, this is the earliest that this came up. Therefore, the Mother agreed to defer the s. 30 assessment shortly after becoming aware of the need for the psychoeducational assessment. I fail to see how these facts demonstrate she does not provide proper care or fails to prioritize of the Child's needs.

Specific Instances of the Mother's Conduct

[117] In his October 18, 2021 affidavit, the Father references incidents which he says have contributed to the Child's distress which he indicates are more fully set out in his November 23, 2020 and February 5, 2021 affidavits.

[118] In his October 18, 2021 affidavit, he summarizes them as follows:

i) not quarantining when she crossed the border on May 10, 2020. This is contradicted by the Mother who says that she quarantined before she left Rhode Island for two weeks, wore an N-95 mask the whole way as well as nitrate gloves to pump gas and only made two stops sanitizing each time. She was permitted to cross the border. Although the Father makes this complaint about her, he permitted the Child to go with her on May 10, 2021 and the Mother's evidence is that the Father did not raise any concerns at that time. Given that on the record before me he has had no hesitation in stopping her parenting when he has had concerns, I find the fact that he let the Child go with her on May 10, 2021 supportive of the Mother's evidence that he did not express any concerns with her at the time about any alleged failure to quarantine.

ii) proposing that a family friend pick up and deliver the Child to her on May 15, 2020. I am unsure as to why the Father is so concerned about this;

iii) not returning the Child to the Father on May 19, 2020 because she was quarantining. In his November 23, 2020, the Father says the Mother improperly copied the Child with a text where she advised the Father that the Child wished to stay with her another two weeks. The Mother's evidence is that the Child had asked to see their communication so that he had transparency about plans that affect him and that he had asked for her assistance in speaking openly to the Father about his preferences. I agree she should not have done this even if the Child requested;

iv) refusing to confirm parenting times in June and October 2020 which he says caused a standoff which upset the Child. I note that based upon the Father's prior affidavits, this statement appears to relate to an incident on October 5, 2020 and one incident during July, 2020, not June 2020. I have specifically considered these incidents in these reasons below (the July incident is discussed below in paragraphs 147 to 148 below); and

v) attending at his home and repeatedly ringing the doorbell and kicking the door "**when there was no parenting time agreed to"**. The October 18, 2021 affidavit does not provide a date for this incident.

[119] The Father's November 23, 2020 affidavit makes it clear that this door ringing incident occurred on the October 5, 2020 **when it was specifically agreed that the Mother would have parenting time.** Therefore, the statement in the Father's October 18, 2021 affidavit and his February 5, 2021 affidavit that the door ringing incident occurred "when there was no parenting time agreed to" is contradicted by his own prior November 23, 2020 affidavit.

[120] The Father's November 23, 2020 affidavit says that he advised the Mother on October 5, 2020 via Family Wizard that the Child had a sore throat, headache and runny nose and might need to be tested for COVID. The Mother's counsel then wrote to the Father and said she would pick up the Child as per their plan at 2:22 pm. These communications are attached to his affidavit.

[121] At that time, the Mother had not seen the Child for one month. The Mother says she telephoned the Child's physician who told her there was no reason the Child could not transition to the Mother's care, apart from the risk to her which she was prepared to take, although this is inadmissible for the truth of its contents as it is hearsay.

[122] It is uncontradicted that the Mother was unable to connect with the Child to see how he was doing. The Mother says she panicked. She wanted to see the Child and see how he was doing and drove to the home but no one answered. It is uncontradicted that she then sat in her car and requested through counsel that she speak to the Child but it was denied.

[123] I find the Mother's explanation, and even the conduct in driving to the Father's home, understandable and reasonable given the ongoing pandemic and the fact that she could not connect with the Child. As well, while it is true that the Child's physician said the Child should stay home pending resolution of his symptoms or his COVID test, he did not say specifically say it had to be the Father's home. The physician's comments (contained in the record) were clearly referencing the Child not going to school.

[124] It is curious that even though the Father had agreed that she would have parenting time on October 5, 2020, had told her the Child had COVID symptoms, he did not even answer the door (or speak through the door if he was concerned about contamination) to respond to potential questions about how the Child was doing, or consider letting the Child talk to the Mother as she requested through counsel. It might have also been a comfort to the Child. These are trying times and many people are very worried. The Father's conduct in not answering the door to assuage the Mother's concerns, or allow any communication with the Child at that time, was unreasonable in the circumstances and led to the conflict and the multiple doorbell rings that ensued.

[125] In his November 23, 2020 affidavit, the Father also cites incidents of the Mother walking to school with the Child in the morning on a few days when it was his parenting time during November 2020 which he says violates the spirit of the 2014 parenting plan.

[126] The specific examples the Father cites are somewhat concerning, but they are over a year old and occurred during the height of the parties' dispute, when the Mother was not receiving all her parenting time pursuant to the 2014 parenting plan and the Child was in significant distress during a pandemic. The earliest incidents were right after the Child telephoned the Mother, asking her to come and see him; upon which she drove across the border and the Father and Mother were unable to agree upon the Mother's parenting time. In his November 2020 affidavit, the Father admits that prior to these early incidents, the Child had not seen the Mother for six weeks because of border restrictions.

[127] The materials contain dozens of communications between counsel regarding parenting time where they simply cannot agree and both sides blame each other. It is well beyond the scope of this decision to determine which parent is being the most unreasonable in each instance. It is almost impossible to follow the correspondence and the variety of disputes and allegations made therein. The most that I conclude is that the parties' inability to be able to agree to the Mother's parenting time is contributing to their conflict, poor decision making, and the Child's distress.

[128] The Mother admits that mistakes were made by both of them and that she accepts responsibility for her portion of these errors. I note the Father has not in any of these materials taken any responsibility for any of this conflict. He blames the Mother entirely.

[129] It is in the Child's interests that there be a fixed, predictable schedule so that these kinds of problems do not occur. In her October 24, 2021 affidavit the Mother states (and it is uncontradicted) that since the February parenting orders, there have been only minor disagreements.

Willingness to Support the Other Parties' Relationship with the Child

[130] The Mother indicates that she supports the Child's relationship with the Father and has attached texts to the Child which support this.

[131] However, the Father asserts that the Mother has been interfering with his relationship with the Child "**starting in May 2020**" (as per his November 23, 2020 affidavit) [Emphasis added].

[132] There are some disputed facts, but overall, the narrative that at the exact time the Child began having significant difficulty because of his undiagnosed learning disability, anxiety, somatization and on-line learning during a pandemic, the Mother coincidently came back, not to support the Child, but to drive a wedge between the Father and Child, stretches credulity. Bear in mind that this is the Mother who ceded custody after a custody battle and the Father put no evidence before the Court that any time prior to May 2020 the Mother was interfering with his relationship.

[133] In his October 18, 2021 affidavit, the Father describes an incident which involved the Child telephoning CAS in November 2020. The Father is the one who has put this evidence in. It is double hearsay in some instances; but it is his evidence and I am accepting it as to what he observed and what he was told.

[134] The Father's October 18, 2021 affidavit provides the following information about this incident: One day in November 2020 the Child came home with a bruise under his lip. On November 9, 2020 **t**he Child telephoned CAS. Later that week, the Father received a call from Ms. Chan of CAS who said they received a call from the Child who said he was "**scared**" about Father's reaction to an incomplete assignment and that he wanted to live with the Mother because she was "**nice**". [Emphasis added] CAS confirmed that the Mother had given the Child the number to call.

[135] The Father's November 23, 2020 affidavit contains the following additional details: i) that the Child had reported to CAS that previously the Father had ripped up a test of his, had yelled at him, thrown things and has grabbed his chin, and ii) that the Child had reported the incident to the Child's school, the Child's new school, who had also contacted CAS.

[136] The Father's November 23, 2020 affidavit indicates that he was "**profoundly disappointed**" to hear these things from CAS which he says are not true. [Emphasis added]

[137] The Father's November 23, 2020 affidavit says that he discovered the following text message between the Mother and Child which he said "demonstrate [the Father's] concern the [the Mother] is condoning [the Child's] deception and condoning his lies."

> Thursday November 12:
>
> Mother: Hi Boo! Just wanted you to know that I love you soooo much! I'm proud of you☺
>
> Sunday November 15, 2020:
>
> [Mother]: How are you making out Boo? Did you have a nice weekend?
>
> [Child]: ya can you come to school tomorrow
>
> [Child] I'll tell you
>
> [Mother] Ofcoarse sweetheart. Hope you had some fun!

[138] There is nothing in this text where the Mother tells the Child to lie or encourages the complaint, although the timing and context could be read to be about the Child's call to CAS.

[139] Although missing from his October affidavits, his November 23, 2020 affidavit reports that, after CAS spoke to the Child, "[t]he [Child] told [the Father] that he told CAS he was not as **scared** as he had been when he called them. He said he was not **worried** anymore." [Emphasis added]. This is a far cry from the Child telling the CAS or the Father he had lied or that someone had put him up to calling. The fact that he said he was no longer **scared** or **worried** is not a ringing endorsement of the Father.

[140] While I am in no position to accept the underlying facts regarding the CAS complaint, or what happened, it is undisputed that the Child said these things about the Father's behavior to CAS—the Father's own evidence is that the Child said them. There is no evidence that the Child has ever resiled from the things that he said. Had he done so, I infer the Father would have said so explicitly somewhere in his four affidavits.

[141] There is no CAS file before me either. The fact that CAS closed its file does not mean that it concluded that the Child had lied or that it drew any conclusions about the Mother's involvement, other than that she gave the Child the telephone number. The nature of the Child's complaints were likely well below the kind of allegations that CAS would typically get involved with.

[142] Even if the Mother should not have given the Child the phone number (which I agree was wrong), I find it odd that a twelve-year-old adolescent boy would phone CAS and make these allegations and then inform his school. It is concerning that the Child reported that the Father had grabbed his chin, and there is also a photograph from around the same time of a large bruise under the Child's bottom lip, which the Father has appended to his prior affidavit materials. In his prior November 23, 2020 affidavit, the Father explains that the Child caused the bruise himself by biting down hard on his lip because of his anxiety over having told a lie. If this is true, it is very concerning that the Child's somatization and anxiety has gotten to the point where he has caused himself physical harm when upset.

[143] The Father indicates in his October 18, 2021 affidavit that he found texts which "suggested that [the Mother] encouraged [the Child] to tell CAS something that was not true." He did not produce any such texts, indicate why he was able to see them, or even set out what she allegedly specifically said as opposed to his interpretation. It appears to me that the text he is referring to in his October affidavit is the one I set out above from his November 23, 2020 affidavit.

[144] As well, it also appears based on his previous affidavits that the Father has access to the Child's electronic communications.

[145] In his November 23, 2020 affidavit the Father states that to ensure that the Child uses electronics safely, he has parental controls over the Child's phone. He has produced images of the Child's texts in this proceeding in prior affidavits. He has also specifically set out some in his Answer.

[146] Despite this, and his allegations of her improper communication and alienation, there are no troves of texts in the record between the Mother and the Child which are inappropriate. The Father's November 23, 2020 affidavit referenced one single incident of what I consider improper text communication between the Mother and Child.

[147] This occurred in July 2020, shortly after the Mother returned from Rhode Island, when the Mother showed up to pick up the Child, and there was a dispute over when the Child would be returned to the Father's care. This lengthy text exchange is specifically set out in the Father's affidavit in full. The Mother tells the Child that the Father will not permit him to go with her and she says that the Father is wrong and unreasonable in this. The Father's position is that she would not agree to a return date which is why he would not send the Child to her. One of the Child's texts

says “Mom please promise to bring me back in two weeks through the lawyer and dad said we will be right there.” This demonstrates that the Father was also involving the Child in the conflict at that time. Otherwise, how would the Child have known the Father’s position?

[148] I agree that this text communication was improper and not in the Child’s best interests, but it is the only one I have seen. It is stale dated, and frankly supports that the Father was also improperly communicating with the Child at that time about their arrangement. It also shows the difficulty their failure to agree is causing the Child.

[149] I infer that had there been more examples of improper communications as of February 5, 2021, or November 23, 2020, the Father would have included them in those affidavits.

[150] As well, I infer that the Father still has parental control over the Child’s texts and can see them, as his October affidavits do not indicate that there has been any change, or indeed say anything at all about parental controls on the Child’s phone. It is curious that in his October 2021 affidavit, the Father criticizes the Mother for failing to produce all her text communications with the Child in the circumstances where he can already see them based upon prior affidavits.

[151] There is no other independent evidence about the Mother disparaging the Father apart from his opinion that that must be the cause of the difficulties he is having in his relationship with the Child. He makes a vague reference to the Child’s ability to use Snapchat in his February 5, 2021 affidavit, which he says he cannot monitor (which implicitly means he can monitor other communications). However, there is no relief claimed before me related to Snapchat, so I infer his parental controls allow him to block Snapchat or it is not a problem anymore. As well, he has placed no evidence before me of the Mother using Snapchat other than his opinion.

[152] I agree that the Mother’s conduct regarding the CAS incident described above is concerning, but the only persuasive evidence of her involvement is that she gave the Child the phone number. The Child did have a bruise. The Child was making allegations against the Father, whether they were true or not. The incident occurred more than a year ago when the Child was in the midst of significant distress which both parents have been reacting to and attempting to deal with. It was a very stressful time for them both.

[153] The Father has cited no recent examples of any similar conduct by the Mother.

[154] I am not persuaded on this record that the Mother is the cause of the apparent rift in the Father’s relationship with the Child. The Father has it backwards. The Child was already upset and distressed and the Mother came back to Toronto to help, not the other way around.

The Mother’s Mental Health

[155] The Father also references the fact that the Mother was previously diagnosed with bipolar disorder. He has implied throughout that she is having a bipolar episode based on his assumptions about her mental health diagnosis. The Mother’s uncontradicted evidence is that in 2013 the Father alleged that she was unfit and this was part of the reason for the section 30 assessment that was

done at that time. As noted above, the section 30 assessor concluded that the Mother and Father should have shared parenting.

[156] I have reviewed a variety of written communications from the Mother over the last year and a half directed to the Child's school, his coaches, the Father and others. These communications are not worrying at all. There is no persuasive evidence before me that the Mother's behavior and concern about this admittedly distressed and anxious Child is a bipolar episode, as opposed to being a mother's intense reaction to the Child's distress and anxiety during a stressful pandemic.

[157] The Mother says that the Father has repeatedly used her mental health as a weapon against her in their various parenting proceedings and that he is preoccupied with a "stigmatizing, false narrative of her mental health" in response to her request for more parenting time. This is supported by the fact that the Father has raised the Mother's mental health prior to the 2013 section 30 assessment and throughout this proceeding, beginning in November 2020. It is concerning that he raises this repeatedly but still lets her see the Child when it is acceptable to him, sometimes for seven (or more) days in a row. His proposed schedule for the Mother for the remainder of the academic year provides her with 35 % of the parenting days.

[158] These are not the actions of someone with a real concern about the Mother's mental fitness to care for a Child.

[159] It is uncontradicted that at the Father's request, the Mother has submitted numerous letters from medical professionals. Even though he has required this, he objects to the admission of such documents before me which include a September 8, 2021 medical note.

[160] I am not concerned about the quality of the Mother's evidence in this regard. The party who alleges must prove. There is no burden or reverse onus on the Mother to prove her mental fitness to care for a child just because the Father has made an allegation, or she has a prior diagnosis. If the Father thinks there is something significant about the Mother's mental health that should prevent shared parenting, he must prove it. He has not. Even if I do not take into account the letters which the Mother has appended to her affidavit about her current mental health, all the Father has is allegations supported by a few dated incidents of intense behavior which I have considered above. The Father admits in his November 23 2020 affidavit that at that time, he had had no updates on the Mother's current mental health status and was "unable to comment on her current state of mental fitness."

[161] Therefore, I accept the Mother's own evidence that she was diagnosed with bipolar II in 1999 while in university. She has experienced only one hypomanic episode in 2009 after separating from the Father, which was isolated and induced by a doctor-prescribed antidepressant. She has never experienced a full-blown manic episode, nor psychosis, nor hospitalization for mental health reasons. Since 2009, her disorder has been well managed and is under control. She sees a therapist, practices self-care, has weekly meetings with a trauma specialist and follows all recommendations.

[162] The Father obviously does not consider her past diagnosis to be a bar to significant parenting time, as she has shared parenting time during all holidays and has had ongoing parenting time with the Child. I find the Father's assumptions about the Mother and his repeated reference

to her diagnosis very concerning because his own son has a mental health diagnosis which could also be quite stigmatizing for him.

Has the Child Thrived in the Father's Care?

[163] The Father asserts that the Mother is seeking to disrupt status quo arrangements, in which he says the Child has "thrived". Both the Mother and Father are to be given credit as this Child on all accounts seems to be a wonderful Child. However, the uncontradicted evidence is that the Child has actually been experiencing significant distress and anxiety. The Child is currently in therapy. He is not currently thriving.

[164] I note that the Child's distress, anxiety and somatization all arose while the Child has been under the Father's primary care. The Father has had primary decision making over education and health since the Child was six years old. There is no evidence before me that anyone considered the possibility that the Child might have ADHD or sought a psychoeducational assessment until the Child was already twelve years old even though the Father's February 5, 2021 affidavit indicates that the Child has historically had academic struggles as well as anxiety around writing tests.

[165] There are also concerns about the Father's conduct and decisions with respect to the Child and these concerns are more recent.

Strength of relationship with each set of siblings and grandparents/Travel

[166] It is uncontradicted that the Child has a strong bond with both sides of the extended family.

[167] Before me, the Father asserted that the Mother should not be able to travel with the Child during the school year, even on long weekends as she has done throughout their arrangement so that the Child could see his extended family.

[168] He asserts that travelling to Rhode Island would disrupt the Child's stable routine and pose a risk that she could take the Child out of school on a whim. The Mother states that she will not take the Child out of school.

[169] The 2014 Parenting Plan provides as follows:

> 42. The parties acknowledge that during [the Mother's] regular parenting time with [the Child] she may be at her primary home with Randall Shore in Rhode Island, U.S.A. or her secondary home with her parents at the family farm in Caledon, Ontario. Either parent may travel with [the Child] in Canada at any time with proper notice and contact information provided to the other parent.
>
> 58. [The Child] may travel out of the province or country with either parent during weekends or vacations, with proper information provided to the other parent.[Emphasis added]

[170] It is uncontradicted that the Child has spent parts of the summer, other holidays and long weekends in Rhode Island, and has a stepbrother there and a stepfather who he has a strong relationship with. It is uncontradicted that the Child has not seen his stepbrother since Christmas 2019 and has only seen his stepfather once since Christmas 2019. The Father's position that she may not travel on long weekends to maintain the Child's relationship with them is unreasonable, not in the Child's best interests, and not in accordance with their 2014 parenting agreement.

[171] As well, the Father would not consent to the Mother travelling for Canadian Thanksgiving in 2021 (the weekend beginning October 7, 2021). He asserts that it was because the Mother did not seek his approval quickly enough or in an organized enough manner.

[172] The Mother's lawyer wrote to the Father on September 8, 2021 indicating she may wish to travel for Thanksgiving. The Father's lawyer wrote to the Mother's asking about her Thanksgiving plans on September 15, 2021. The Mother's lawyer responded on September 16, 2021, "[The Mother] does not have firm family travel plans for Thanksgiving. She does want the ability to travel with [the Child] over that long weekend to see immediate family, either in Nova Scotia or Rhode Island." There is no response in the record to the Mother's September 16, 2021 email.

[173] Then, the Mother's lawyer wrote on September 30, 2021 and followed up seeking his consent. She indicated that normally she would have planned sooner, but the consent order at the case conference prevented her travel.

[174] When Justice Wilson considered this matter, the Applicant had agreed that due to COVID 19 any access she had would take place in Toronto until it is safe and acceptable to cross the border to the United States without quarantine requirements either in the U.S. and Canada. Any access to be exercised in Rhode Island will only take place once these conditions are met.

[175] The Mother and the Child are fully vaccinated and could travel pursuant to existing travel restrictions.

[176] The Mother advised that even though the tickets would be very expensive now "given the length of time her family has been separated, [the Mother] is willing to incur a significant financial burden by purchasing plane tickets at the last minute."

[177] I do not accept the Father's explanation that it was poor planning that scuttled her weekend away. Even if he would have preferred more notice, and the pandemic and travel restrictions were present, the Child had not seen his extended family and it was in his interest that he did. I fail to understand why seven days-notice was insufficient given that the Mother would pay all costs associated with the late purchase of the tickets. The 2014 Parenting Plan permits travel and does not require any specific time period for notice to the Father. However, the Child did have an exhibition hockey game that weekend and the Mother's proposed plans interfered with that. As will be seen, hockey is very important to the Father.

[178] I note that the Father drives with the Child on weekends to Thornbury and he finds this acceptable. I also note that after the motion, the parties advised me that the Father had subsequently

agreed that the Mother may have parenting time in Rhode Island from November 23 to Nov 29 (U.S. Thanksgiving) in accordance with the previous year. I commend the Father for acquiescing to this at this time, however it does not alter his general position that the Mother may not travel on other long weekends during the academic year when she has parenting time.

[179] I will be making an order that she may travel with the Child during her parenting time provided it does not conflict with his school.

Hockey

[180] The Father requests a court order that the Mother must take the Child to his hockey practices and games during her parenting time. The Father's main concern in this regard is that the Mother kept the Child home from hockey when he had a sore throat and cough on October 24, 2020, made a request that the Child miss some practices during the summer of 2021, as well as the fact that the Child did not attend a game on August 2, 2021. I note that based on his July 23, 2020 affidavit, the Father also kept the Child home from hockey practice on October 4, 2020 because of the Child's sore throat and cough which he must have thought was acceptable.

[181] There is considerable case law that discusses the importance of sports for children: see e.g. *Gugushvili v. Shestak*, 2019 ONSC 5094, at para. 10; *Richer v. Freeland*, 2019 ONSC 6840, at para. 41.

[182] The Child was part of a summer league because the children had been unable to play during the previous year due to COVID.

[183] The Mother did write to the coach on July 7, 2021, copied to the Father, advising that she was the Child's mother and seeking to introduce herself. In that email she stated that "a couple of the dates may not work for [the Child] this summer, as we are trying to see family that we have not been able to connect with for over a year due to the pandemic."

[184] The responding email from the coach dated July 7, 2021 stated: "No problem if [the Child] can't make a couple. As of right now we're just doing the leak and we will figure out practices further down the road. It's just to get the boys together and get playing."

[185] The **one** game which the Child missed while in the Mother's care during the summer of 2021 was when she travelled with the Child to see his terminally ill maternal grandparent. The Child is thirteen and has already run away once. It is difficult to accept that the Child would have gone with the Mother to see his terminally ill grandfather if what he really wanted to do was attend summer hockey instead.

[186] In my view, the Father's prioritizing a couple of summer hockey dates over the Child seeing his stepfather, stepbrother, and terminally ill grandfather is not putting the Child's best interests first. The Father should be considering how the Child would feel if he missed a visit with a terminally ill grandparent because of hockey, and then that grandparent passed away.

[187] The Mother confirms that she is prepared to bring the Child to his hockey practices and games. She has signed a commitment letter for the Child's hockey this season. She has connected with the hockey coach to ensure she receives all team emails, (supported by emails in the record) is aware of the calendar, and repeatedly said she supports his hockey.

[188] While it is important for the Child to have structure and stability, and while hockey is an important part of his life, it may be that sometimes something else is more important than a hockey practice or game—like seeing a terminally ill grandparent. Even his current league recognizes that there are sometimes reasons why a player might miss a game or practice. The 2021-2022 Player Handbook for his team provides: "It is expected that your child will attend all practices and games. If your child will miss a practice or game, it is essential you phone or email coaching staff at least 24 hours prior to."

[189] I also do not view the Mother's initial questioning of whether the Child's hockey (AA as opposed to AAA) was considered "**elite**" to be any belittling of the Child as alleged by the Father. The 2014 Parenting Plan provides as follows:

> [The Father] will make decisions in regard to [the Child's] extra-curricular activities and sports. [The Mother] will have no obligation to bring [the Child] to any lessons, activities or sports when [the Child] is in her care. However, if [the Child] achieves an elite level of participation and competition in any sport or activity, [the Mother] will ensure he attends practices, games, or events when in her care.

[190] The Mother's explanation that she was concerned with the interpretation of the 2014 Parenting Plan and her obligations thereunder is reasonable. I add that there is no independent evidence before me that AA is considered an **elite** level of hockey, and as such I am not prepared to make an order requiring her to bring the Child to hockey on the basis of any contractual obligation. In any event, I am not bound by their agreement when it comes to the best interests of the Child.

[191] I see no need for any court order against the Mother requiring her to bring the Child to hockey, but I will make an Order that both parents prioritize hockey, subject to urgent circumstances.

Is the Child Under too Much Pressure

[192] While these are certainly contradicted facts, the Mother's January 31, 2021 affidavit states that "the [Father] has told [the Child] that if he does not achieve at or above a certain grade levels at school then he does not belong in the family…he does not feel like he can "be himself" in [the Father's] home…yells at [the Child] all the time, calls [the Child] lazy and shames [the Child]. and that he doesn't feel comfortable talking to mom about it on the phone because dad is always listening." It states that on several occasions the Father has belittled the Child for crying.

[193] It is early days in this proceeding to draw any conclusions on these allegations. However, the fact that the Father was contemplating the Child being an "**elite**" athlete when he was only six

years old, and negotiated specific contractual requirements for the Mother in that eventuality in the 2014 parenting plan, is some independent evidence about the Father's high expectations.

[194] This is particularly so when considered in conjunction with: i) the Child's statements to CAS, which on the record before me he has never resiled from, about being scared of the Father's reaction to an incomplete assignment and his prior ripping up the Child's schoolwork and yelling at him; ii) his running away from the Father's; iii) the psychoeducational report which documents the pressure he feels and the impact it is having on him; and iv) the Father's comments to the school about his **disappointment** in the Child's French mark--which **disappointment** was expressed right after the Child had had a very difficult year which included a psychoeducational assessment, a mental health diagnosis, therapy and accommodations at school.

[195] Indeed, the Father has used the word "**disappoint**" about either the Child's actions or achievements twice on the record before me, himself in his materials. He also makes a very odd statement in his November 23, 2020 affidavit where he says he has "been supporting [the Child] with his studies **no matter what the results are**." [Emphasis added] Would it be in any parent's contemplation that a Child would or should only receive or deserve help dependent on the results?

[196] While certainly not determinative at this stage, these facts support the Mother's concerns about the Child being under too much pressure.

After School

[197] Regarding the Mother's request that the Child be permitted to spend time with either parent after school until 8:30 pm regardless of whose parenting time it is, I agree that for the time being this would put the Child in a "loyalty bind".

Is Shared Parenting Sustainable?

[198] In his November 23, 2020 affidavit, the Father says that he "is not opposed to [the Mother] spending more time with [the Child]". In his October 18, 2021 affidavit, the Father says that he supports the Child increasing parenting time with the Mother, but he is concerned about beginning a 50/50 shared parenting schedule which he feels is not sustainable. This is significant. If the Father could be persuaded that the Mother would stay for shared parenting, it appears that he would support it.

[199] However, the Father believes that the Mother is ultimately seeking to move with the Child to Rhode Island and that that is what this Application is about.

[200] The Father references the Mother's January 31, 2021 affidavit where she indicates that her primary residence is Rhode Island. While she does say that, she also says in that affidavit that she has returned to Toronto and is prepared to stay here for as long as the Child needs her. This is also referenced in Justice Kraft's endorsement dated December 11, 2020.

[201] The Father also references correspondence from the Mother's solicitor dated June 18, 2021 where she proposed that the Child reside with her in Rhode Island for three weeks with the Father

having parenting time for one week also in Rhode Island. I note that this letter proposed this for the current academic year only for a variety of reasons, including that Rhode Island offered more possibilities during the pandemic because of high vaccination rates, low COVID rates, and considerably fewer restrictions--including over sports teams including hockey which would be up and running in the fall. The Mother notes hockey is a very important aspect of the Child's life. At the time of this letter, the Child had been unable to participate in fall sports because of COVID. The letter stated:

> For the upcoming school year, the Mother proposes a change of schools for [the Child], to a school that is better equipped to meet [the Child's] learning and emotional needs, has more individual support and a less competitive educational environment. The Mother proposes that [the Child] attend school at St. Michael's Country Day School in Newport Rhode Island. St. Michael's provides positive encouragement, mindful communication, and a supportive student culture.

[202] While I have no doubt that the Mother would prefer to move to Rhode Island with the Child if the Father would permit it, she does not request that in this Application. I have reviewed the Mother's Application thoroughly. While it contains a request for primary residence (or in the alternative primary decision making over health, education and psychological decisions), there is no request for primary decision making over mobility. In section 16.9 the *Divorce Act* contains specific provisions regarding any request to relocate a child, and the Mother has not made such a request in her Application or taken any of the steps set out in the *Divorce Act.*

[203] Even if that is her ultimate intention, the only thing that the Court will take into account is the Child's best interests. The possibility that the Mother may seek to amend her application and a court could ultimately be faced with making that determination is not a reason to not increase her parenting time immediately in Toronto, if that is in the Child's best interests.

[204] I am more concerned with the urgency of the Child's immediate needs than what could happen two years from now. This proceeding was commenced almost a year ago and has not gotten very far.

[205] Given all the circumstances before me, including the difficulties the Child is having, his uncontradicted wish to have more time and support from his Mother should be taken into account right now. It is not appropriate to wait until after what will apparently be a long, drawn-out battle over a section 30 assessment, and certainly not two or three years from now when the case is concluded, all appeals are complete and he is almost fully grown.

[206] I find that the Mother has a strong bond with the Child, is willing to support and develop the Child's relationship with the Father and his extended family, and is willing and able to care for the Child in all the appropriate ways. I find that it is in his best interests that the Child have more parenting time with the Mother.

[207] The real question is, how can the Child's parenting time with the Mother be increased in a stable and predictable way?

Proposed Schedules

[208] The Mother's proposal is shared on either a rotating 10 day schedule or on a week about basis in the alternative.

[209] The Father's proposed schedule provides the Mother with 75 of the 212 days between December to the end of June—which is approximately 35 % of the time. The Father must be of the view that the best interests of this Child require at least this amount of parenting time with the Mother.

[210] The Father's sworn evidence in his October 18, 2021 affidavit is that his proposed schedule will "ensure clarity and consistency…with most pick-ups and drop-offs occurring at the beginning of the week." However, the schedule proposed by the Father does not actually do this or even have most pick-ups and drop offs occur at the beginning of the week. This is the exact schedule proposed by the Father from December onwards:

Period	**Total Number of days in a row**	**Total number of days in a month**
Wednesday Dec 8 to Wednesday Dec 15	7	Total in December: 18
Friday Dec 24 to Monday January 3	11	
Friday Jan 7 to Friday January 14	7	Total in January: 11
Monday January 24 to Friday January 28	4	
Thursday February 17 top Thursday February 24	7	Total in February: 7
Thursday March 3 to Thursday March 10	7	Total in March: 11
Thursday March 24 to Monday March 28	4	
Wednesday April 13 to Wednesday April 20	7	Total in April: 7

Thursday May 5 to Thursday May 12	7	Total in May: 14
Thursday May 26 to Thursday June 2	7	
Friday June 17 to Friday June 24	7	Total in June: 7

[211] The schedule the Father proposed in his Notice of Motion is haphazard and does not provide sufficient predictability and regularity for the Child, which is problematic given his diagnosis. The duration of the Mother's parenting time in Father's proposed schedule varies between four and eleven days in a row. It also commences on a variety of weekdays including Monday, Wednesday, Thursday, and Friday, and also has a variety of days of the week when the Mother's parenting time ends, including a Monday, Wednesday, Thursday, Friday. Oddly, even though the Father says most pickups occur on a Monday, there is only one Monday pickup. This proposal completely fails to take into account the Child's need for a predictable routine given his diagnosis.

[212] It is particularly unclear to me why some months the Mother has 7 parenting days while in others it is up to 14 (apart from December which is a holiday month and he proposes 18). This is a very unworkable, unpredictable and inconsistent plan for this Child. It is concerning that the Father does not recognize this.

[213] Taking into account the need for stability and predictability, the Mother's relocation for the purposes of shared parenting, and the Child's wish to spend more time with her, the most appropriate parenting schedule is week-about parenting. This would provide the Child with more time with the Mother, which is his wish. It would provide predictability and stability as he would spend one week with his Father and one with his Mother from Friday to Friday. He would not have to go that long without being able to see either parent. It would reduce the conflict as all transitions would be on a Friday after school and the Father and the Mother would not have to communicate very much any longer. The Child would also feel less torn because he would have the same amount of time with both parents. In my view, it would also help to improve the Father's relationship with the Child if this Court and the Father supported the Child's wishes in this regard. For these reasons, I find that week about parenting is in the Child's best interests.

[214] The Child will be fourteen soon. He has already run away from the Father's once on a day before a court hearing was to take place. The assessment indicates that impulsivity is a part of ADHD. If the parents and this Court do not recognize his views and preferences right now, there is every likelihood that he will simply exercise his views and preferences on his own; if and when he does so, there is no guarantee that he will do so safely.

[215] Given the extreme conflict in this case and every likelihood that the parties will be unable to agree after the end of this school year, I am exercising my discretion to impose a week about parenting schedule during the school year, not only until the end of June 2022, but pending further

court order or agreement of the parties. This is beyond what the parties have sought, but the conflict in this case is so detrimental to this Child that it is necessary that a parenting plan be in place until final determination in this matter.

[216] As noted above, in *Papp* the Court of Appeal stated "[t]he *Divorce Act*…. reposes a discretion in the Court in speaking of the making of interim orders 'as it thinks fit and just' in respect of maintenance and custody of children."

[217] This is the third motion and the second parenting plan motion in a year. There was also a case conference on October 7, 2021 to address the Mother's parenting time; this Court has had to intervene to address the Mother's parenting time three times this year.

[218] This Child should not have to wait with baited-breath while these parents unsuccessfully negotiate piecemeal parenting plans periodically, followed by a return to court when they cannot agree. He requires predictability and stability which can only be achieved by one parenting plan pending trial. Therefore, it is fit and just that the week about parenting plan continue until further order of this court or agreement of the parties.

[219] I have no concerns that the Mother is not prepared to see this through on this record. If the Mother does not continue with week about parenting during the academic year in Toronto as this Order requires, it will impact the relief she seeks in her overall Application. This should satisfy the Father.

Parenting Coordinator

[220] With respect to the Father's request for a parenting coordinator, the Father had no persuasive submission on the additional utility of a parenting coordinator if the parties had a specific and clear schedule.

[221] The Mother says that the parties mostly communicate by Our Wizard. They previously had a parenting coordinator because the Mother's parenting time was not fixed by the 2014 parenting agreement, but was stated to be in terms of a minimum amount.

[222] The Father argues that the 2014 parenting plan requires them to have a parenting coordinator, but it only required it for two years from September 1, 2014 to February 2016. The Mother's uncontradicted evidence is that the Father unilaterally terminated the parenting coordinator.

[223] Curiously, at the conclusion of the motion, when I asked what utility a parenting coordinator would be in this situation, counsel for the Father submitted that there should be no court ordered parenting time for the Mother even though he had brought his own motion for a particular schedule; he submitted the parties should simply continue on some kind of ad hoc basis

with a parenting coordinator. He confirmed his position in writing later that the proposed parenting plan was an alternative request if I did not order a parenting coordinator even though his affidavits said nothing of his proposal being an alternative position.

[224] Using a parenting coordinator has not worked in the past and has led to significant conflict and distress for the Child. This makes no sense in terms of the best interests of the Child, but it would give the Father leverage, as the Mother would continue to have to ask for the Father's permission and agreement. Rather than consider the Child's best interests, which requires a fixed and predictable schedule, the Father's ultimate submission on this motion was strategic and would likely lead to further conflict. They are playing hardball.

[225] I note that I inquired at the case conference as to what agreements were currently in place for the Mother's parenting time to ensure I delivered my decision at the end of any such agreement to stop the conflict. The motion was argued on November 2, 2021 and supplementary submissions were complete by December 1, 2021.

[226] It appears that the only thing that the Father had agreed to pending the outcome of the motion was that the Child could have parenting time with the Mother from November 11 to November 18 and that the next time the Child would see her was beginning December 24, 2021. More than a month would go by. As noted above, he subsequently agreed to the Mother taking the Child to Rhode Island from November 23 to 29 (US Thanksgiving), but even this concession means that the Child will not see the Mother for more than three weeks.

[227] I note as well, that the Father's proposed parenting plan for this motion would have provided the Mother with parenting time from December 5 to December 15 and he still did not agree to this pending the outcome of my decision. I ask the rhetorical question, what utility would a parenting coordinator be when the Father will not even agree to something he proposed in his own Notice of Motion, without a court order?

[228] The Father's approach is not very Child focused.

[229] Given the nature of this dispute I have little confidence that a parenting coordinator would be of any assistance at this time. I am dismissing this motion.

Office of the Children's Lawyer

[230] If this Child is actually going to have to go through a second custody battle, he should have his own lawyer, particularly given his diagnosis and ongoing stress and anxiety. I am exercising my discretion to request that the Office of the Children's Lawyer appoint counsel to independently represent the Child.

Section 30 Assessment

[231] I am granting either party leave to bring a motion for a section 30 assessment which this court will hear on an urgent basis. I am **not** seized.

Settlement Conference

[232] I am also scheduling a combined settlement conference and trial management conference for March 16, 2022 at 10:00 am. Given the Child's age and circumstances it is important that this matter be expedited.

Conclusion

[233] I add that it appears that both the Mother and the Father love the Child very much, are trying to act in the Child's best interests as they see them. All of their various decisions and actions have been made within the context of a very stressful situation which includes this pandemic and the online learning, which has been a challenge for the Child. The Mother emphasizes the Child's emotional stability and relationships with his extended family. The Father emphasizes academics and sports. All of these considerations are important and both parents should be taking them all into account.

[234] Again, in my view a week about schedule will be better for the Child in terms of predictability and stability, since parenting time generally occurs from a Friday to a Friday which is much easier for a Child to follow than the haphazard schedule proposed by the Father.

[235] The Father has the March break which he sought as well as the Child's January and final exam period so that he can help the Child study for his exams, which is important to him. This will also ensure that the Child is in one home while studying for exams.

[236] I have provided some extended parenting weeks to incorporate some extended holiday periods which I determine both parents must have already agreed to as these weeks are in both parent's proposed schedule.

Order

[237] Pursuant to sections 16.1(2), 16.1(4), 16.2(1), 16.1(4)(d) and 16.1(5) of the *Divorce Act*, I Order that the Mother and Father shall share week about parenting during the academic year in Toronto pending trial. I also order that they share all holidays equally.

[238] Pursuant to sections 16.1(2) and 16.1(4) and 16.2(1) of the *Divorce Act* I Order the following week-about parenting schedule to commence on December 10, 2021 and continue to the end of June 2022.

> December 10 after school to December 17 at school drop off: Mother
>
> December 17 to December 24: Father

December 24 to January 3, 2022: Mother (I note that both parties had proposed that she would have extended parenting time during this period)

January 3, after school to January 7, 2022 at school drop off: Father (This period is shortened because both parties have proposed that the Mother have extended time during Christmas holidays.)

January 7 after school to January 14, 2022 at school drop off: Mother

January 14 after school to January 21, 2022 at school drop off: Father (This is the period immediately prior to and during the Child's exams which accords with the Father's wish to supervise important academic events.)

January 21 after school to January 28, 2022 at school drop off: Mother

January 28 after school to February 4, 2022 at school drop off: Father

February 4 after school to February 11, 2022 at school drop off: Mother

February 11 after school to February 18, 2022 at school drop off: Father-

February 18 after school to February 25, 2022 at school drop off: Mother

February 25 after school to March 4, 2022 at school drop off: Father

March 4 after school to March 11, 2022 at school drop off: Mother

March 11 to March 25, 2022: Father (This period includes March break and is an extended time period to take into account the extended time the Mother had during Christmas. It also accords with the specific timetables they both proposed)

March 25 after school to April 1, 2022 at school drop off: Mother

April 1 after school to April 8, 2022 at school drop off: Father

April 8 after school to April 22, 2022 at school drop off: Mother (This is an extended period of time to incorporate some professional development days when the Child could travel with the Mother to see her step-father and step-brother in Rhode Island. This also generally accords with the specific timetables proposed by both parties)

April 22 after school to April 29, 2022 school drop off: Father

April 29 after school to May 6, 2022 school drop off: Mother

May 6 school drop off to May 13, 2022 pick up: Father

May 13 school drop off to May 20, 2022 pick up: Mother

May 20 school drop off to May 27, 2022 pick up: Father

May 27 after school to June 3, 2022 pick up: Mother

June 3 after school to June 17, 2022: Father (This is the Child's exam period. I am providing the Father with extended time during this period to reflect his concern about stability during exams.)

June 17 to 24, 2022: Mother (Exams will be over on June 17).

June 24 to July 1, 2022: Father

[239] Pursuant to section 16.1(4)(d) of the *Divorce Act*, prior to the commencement of the summer 2022 and the following school year, the parties shall attempt to organize the way in which week about parenting and holidays will be organized for the 2022/23 school year. If the parties still cannot agree to a particular schedule, they may bring a motion to the court.

[240] Pursuant to section 16.1(4)(d) of the *Divorce Act* I Order that the Mother may travel domestically and internationally with the Child during her parenting time as long as it does not interfere with the Child's school attendance. The Mother shall provide a travel consent to the Father seven days before the proposed travel, which shall not be unreasonably withheld.

[241] Pursuant to section 16.1(4)(d) of the *Divorce Act* I Order that both parties shall prioritize the Child's hockey. Where there is an urgent circumstance that prevents the parent from taking the Child to hockey, the parent seeking to miss hockey shall write to the other parent and seek the other parent's consent. This consent shall not be unreasonably withheld.

[242] Pursuant to section 16.1(4)(d) of the *Divorce Act* I Order that neither parent shall disparage each other or involve the Child in their dispute.

[243] The Father's motion for a parenting coordinator is dismissed.

[244] I Order that either party may bring an urgent motion for a section 30 assessment..

[245] I Order that the parties shall attend a joint settlement and trial management conference on March 16, 2022 at 10:00 am, or such other date which they mutually agree upon.

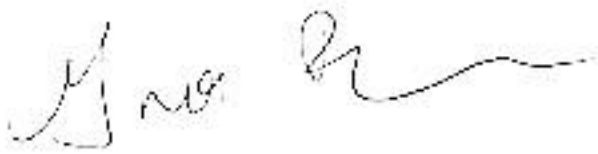
[246] I request the Office of the Children's Lawyer provide assistance in this matter pursuant to either s. 89(3.1) or s. 112 of the Courts of Justice Act. I specifically ask that the Office of the Children's lawyer consider accepting the referral pursuant to s. 89(3.1) of the Courts of Justice Act and that they appoint independent counsel to act for the Child.

[247] Pursuant to section 16.1(4)(d) of the *Divorce Act*, I Order that neither parent shall discuss the CAS incident with the Child.

[248] In my view, it would be best for the Child if both parents attended and advised him together of the new parenting plan. This may not be possible due to the level of their conflict. Pursuant to section 16.1(4)(d) of the *Divorce Act*, I Order that by December 8, 2021 at 7:00 pm the parties shall consult and consider whether they wish to or are willing to advise the Child together. If this is not possible, then either parent may advise the Child any time after 7:00 pm. The Child should be advised only that "**this court has considered this matter and determined that both parents love the Child very much, want what is in his best interests, and that it is in the Child's best interests to have week about parenting time with both parents during the academic year until further order of the court**."

[249] This Order shall be in force and effect without the necessity for an issued and entered order.

[250] If the parties cannot agree on costs, they may make submissions no longer than five pages each within seven days.



Papageorgiou J.

Date: December 8, 2021